90-1384

No. _____

Supreme Court, U.S.
FILED
FEB 25 1991
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In The

Supreme Court of the United States

October Term, 1991

CHARLES BOBST,

Petitioner,

vs.

NORFOLK SOUTHERN CORPORATION and HIGH RIDGE MOTEL COMPANY d/b/a HOWARD JOHNSON'S MOTOR LODGE EAST,

Respondents.

Petition For Writ Of Certiorari To The Court Of Appeals Of Ohio

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Ohio Appellate Court misinterpreted the United States Supreme Court decision in *Missouri Pacific R.R. Co. v. Arby*, 275 U.S. 426 (1928), by affirming the trial court's granting of summary judgment for Defendant, Norfolk Southern, on the basis that Defendant breached no duty of care owed to Plaintiff, Charles Bobst, under the Federal Employers' Liability Act, 45 U.S.C., § 51-60.

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NORFOLK SOUTHERN CORPORATION and HIGH RIDGE MOTEL COMPANY d/b/a HOWARD JOHNSON'S MOTOR LODGE EAST,

Respondents.

Petition For Writ Of Certiorari To The Court Of Appeals Of Ohio

PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

Bobst v. Norfolk Southern Corporation, 564 N.E.2d 500 (1990), Supreme Court of Ohio denied review November 28, 1990 (A-11). The decision of the Ohio Court of Appeals (A-5) and the decision of the Ohio Court of Common Pleas were not reported (A-1).

JURISDICTIONAL STATEMENT

The Petitioner's Motion to Certify was overruled by the Supreme Court of Ohio on November 28, 1990 (A-11). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The statute under which Petitioner requested relief for his injuries was the Federal Employers Liability Act, 45 U.S.C. § 51-60.

STATEMENT OF THE CASE

Petitioner, Charles Bobst, was injured on January 13, 1985, in the course and scope of his employment with Respondent, Norfolk Southern Corporation, an interstate carrier by rail. On the day in question, Mr. Bobst was working as a conductor on a train running between Portsmouth, Ohio and Cincinnati, Ohio. Pursuant to the Federal Hours of Service Act, 45 U.S.C. § 62, which limits conductors to twelve (12) straight hours of work with eight (8) hours of down time between runs, Petitioner laid over in Cincinnati.

Layover housing for Petitioner was provided by Respondent, Norfolk Southern, who had contracted with Howard Johnson's Motor Lodge East. Mr. Bobst was transported to the motel by a Norfolk Southern hired vehicle at approximately 9:00 a.m.

Having checked in, Mr. Bobst set out on foot for a place to eat. He departed through the main entrance of the motel en route to a nearby McDonald's. (The record is silent on the question of whether any or what kinds of dining facilities were available in the motel). Access to McDonald's was gained over a sidewalk outside the main entrance and across the parking lot.

The conditions on the day in question were cold, about 20 degrees, icy and slippery. Mr. Bobst, walking alone, was injured when he slipped and fell on a curb-out on the motel sidewalk, on a ramp-like area, slanted toward the parking lot. The sidewalk on which Petitioner was injured was covered by a natural accumulation of snow and ice, as was the parking lot. Previous to this incident, complaints had been made to the motel management regarding snow, ice and slippery conditions at the motel.

Petitioner promptly filed this cause of action against defendant railroad and against defendant motor lodge, alleging a breach of duty owed to business invitees, pursuant to the Federal Employers' Liability Act, Title 45, § 51-60 in the Court of Common Pleas, Hamilton County, Ohio. The Honorable Robert S. Kraft, presiding, granted summary judgment on behalf of both defendants on January 23, 1989 (A-1). A timely Notice of Appeal was filed on February 21, 1989 (A-3).

The Court of Appeals for the First Appellate District of Ohio, entered its judgment affirming the trial court's judgment on June 6, 1990 (A-5). The Appellate Court held that Mr. Bobst was acting within the course and scope of his employment when he was injured, but that Norfolk

Southern did not breach any duty of care owed to him. Petition for rehearing was denied on July 23, 1990. Petitioner then appealed to the Supreme Court of Ohio, which overruled the motion to certify on November 28, 1990 (A-11).

ARGUMENT

The F.E.L.A. was enacted because Congress was dissatisfied with the common-law duty of the master to his servant. The statute supplants that duty with the far more drastic duty of paying damages for injury or death at work, due in whole, or in part, to the employer's negligence. The employer is stripped of his common-law defenses and for practical purposes, the inquiry in these cases today rarely presents more than the single question of whether negligence of the employer played any part, however small, in the injury or death which is the subject of the suit. *Rogers v. Missouri, Pacific R. Co.*, 352 U.S. 521 (1951). The purpose of the F.E.L.A. has been frustrated and Petitioner, Charles Bobst, was denied the protection owed to him as an employee injured in the scope of his employment as a result of Respondent railroad, Norfolk and Southern Corporation's, negligence.

In making its decision, the First Appellate District Court of Ohio completely misinterpreted federal case and statutory law in affirming the trial court's granting of summary judgment on the basis that Respondent, Norfolk Southern, breached no duty of care owed to Petitioner, Charles Bobst, under the Federal Employers' Liability Act, Title 45, U.S.C. § 51-60 (A-5). The Appellate

Court erred in relying solely upon *Missouri Pacific R.R. Co. v. Aeby*, 275 U.S. 426 (1928) as the basis of their finding. *Aeby* provides no precedential value, because the Supreme Court in *Aeby* based its findings upon the doctrine of assumption of risk, which was removed as an affirmative defense under the F.E.L.A. by the 1939 Amendments to the Act. The essence of the Appellate Court's error was its interpretation that *Aeby* was not based on assumption of risk. This finding is contrary to the *Aeby* decision itself and to post-1939, U.S. Supreme Court and other relevant decisions.

The U.S. Supreme Court must grant certiorari because of the Appellate Court's misinterpretation of Supreme Court law and the resulting prejudice experienced by Petitioner, Charles Bobst. This Court in *United Gas Pipe Line Company v. Memphis Light, Gas and Water Division*, 358 U.S. 105 (1958), granted certiorari because of the claim "that the Court of Appeals misinterpreted our decision in *Mobile* and on the suggestion that its judgment seriously frustrates proper administration of the Natural Gas Act." *Id.* at 109. The circumstances in the case at bar are similar. The Appellate Court's misinterpretation of the *Aeby* decision of this Court "frustrates the proper administration" of the F.E.L.A.

The Ohio Court of Appeals erroneously relied on the case of *Missouri Pacific R.R. Co. v. Aeby*, 275 U.S. 426 (1928) to conclude that the Respondent, Norfolk Southern Corp., owed no duty to Petitioner when he fell on snow and ice. However, *Aeby* is void because it relies on the doctrine of assumption of risk which was completely removed from consideration in all F.E.L.A. cases by the

1939 Amendments to the Act. The Ohio Appellate Court, in a footnote on page 4 of its opinion states

> We disagree with plaintiff's argument that *Aeby, supra* is distinguishable because it relied on the doctrine of assumption of risk, which was abolished by the 1939 amendment to F.E.L.A. *Aeby* held only that since the employer violated no duty owed to the employee, it was not negligent. (citations omitted). (A-7)

The conclusion that "*Aeby* held only that since the employer violated no duty owed to the employee, it was not negligent" is precisely what Charles Bobst requests this Court to consider. It is clear from *Aeby* and from subsequent, post 1939 U.S. Supreme Court and other relevant decisions, that *Aeby* was based on assumption of risk and is of no precedential value.

In its June 6th opinion, the Ohio Appellate Court quotes from the *Aeby* decision at 275 U.S. 430 the following passage:

> No employment is free from danger. Fault or negligence on the part of petitioner may not be inferred from the mere fact that respondent fell or was hurt. She knew that it had rained and that the place was covered with ice and snow. . . . It is a matter of common knowledge that almost everywhere there are to be found in public ways and on private grounds numerous places in general use by pedestrians that in similar weather are not materially unlike the place where respondent fell. Under the circumstances, it cannot reasonably be held that failure of petitioner to remove the snow and ice violated any duty owed to her. . . .

However, the very next sentence in the same paragraph of the *Aeby* decision reads:

> The obligation in respect of station platforms and the like owed by carriers to their passengers or to others coming upon their premises for the transaction of business is greater than that due to their employees accustomed to work thereon. *The reason is that the latter, familiar with the situation, are deemed voluntary to take the risk of known conditions and dangers.* (emphasis added)

Clearly, the *Aeby* court concluded that no duty was owed to the plaintiff because the employee had assumed the risk. The above stated passage compares the "obligation" owed by the railroad to passengers, business invitees and employees. "Obligation" is the same as "duty". *Aeby* turns on the finding that the obligations or duty owed by the railroad to its employees is minimal in this instance because the workers are "accustomed to work thereon." This assumption of risk reasoning is prevalent in that portion of *Aeby* quoted by the Ohio Court. The passage speaks to the fact that the plaintiff in *Aeby* "knew it had rained and that the place was covered with ice and snow." Such knowledge can only defeat a claim if it is considered as the basis for an assumption of risk. If this knowledge is considered evidence of contributory negligence, it cannot defeat liability, but only diminish damages because the F.E.L.A. embodies the doctrine of comparative negligence. A careful reading of *Aeby*, therefore, reveals that the Supreme Court, in this 1928 decision, denied the injured worker's claim on the basis of assumption of risk.

More authoritatively, however, this Court has itself characterized the *Aeby* decision as an assumption of risk decision. In the case of *Tiller v. Atlantic Coast Line Railroad Co.*, 318 U.S. 54 (1943) this Court had the occasion to

discuss the various forms which the doctrine of assumption of risk had taken in prior decisions. The Court noted that in *Tiller*, the lower court had erroneously rejected the railroad worker's argument that assumption of risk had been abolished by the 1939 Amendments and allowed it to be used by the railroad. In overturning the lower court's decision, this Court in *Tiller* stated:

> "We find it unnecessary to consider whether there is any merit in such a conceptual distinction between aspects of assumption of risk which seem functionally so identical, and hence we need not pause over the cases cited by the court below, all decided before the 1939 Amendment, which treat assumption of risk sometimes as a defense to negligence, sometimes as the equivalent to non-negligence.[2] *We hold that every vestige of the doctrine of assumption of risk was obliterated from the law by the 1939 Amendment, and that Congress, by abolishing the defense of assumption of risk in that statute, did not mean to leave open the identical defense for the master by changing its name to "non-negligence"* . . .
>
> [2] See, e.g., *Toledo St. L. & W.R. v. Allen*, 276 U.S. 165, 171, 172, 48 S.Ct. 215, 217, 72, L.Ed. 513; *Missouri Pac. R. Co. v. Aeby*, 275 U.S. 426, 430, 48 S.Ct. 177, 179, 72 L.Ed. 351 . . . "

(emphasis added). *Tiller*, 318 U.S. at 58.

Further, the Eighth Circuit in *Anderson v. Elgin, Joliet & Eastern Railway Company*, 227 F.2d 91 (8th Cir. 1955), stated "the court [in *Aeby*] based its decision on the defense of non-negligence, as is evidenced in its opinion, 275 U.S. at page 431, 48 S.Ct. at page 179: 'As negligence on the part of the petitioner is essential, we need not

consider its contentions in respect of assumption of risk and negligence on the part of respondent.' " The court further states that "while the Court in the *Aeby* case, as shown, relied upon the defense of non-negligence, *it is evident from the language employed that assumption of risk by the injured employee entered into the reasoning of the court by which it held that there was no negligence.*" 227 F.2d at 94 (emphasis added).

As previously stated, the 1939 Amendment to the F.E.L.A. abolished the assumption of risk defense. Therefore, the Ohio Court of Appeals reliance on the *Aeby* decision, based on that defense must be found erroneous. And, classification of *Aeby* as anything but an assumption of the risk case is clearly a misinterpretation. The *Anderson* court further held "the reasoning of the *Aeby* case has definitely been repudiated by the Supreme Court in *Tiller v. Atlantic Coast Line* . . . and in light of *Tiller*, we think the basis for the decision in *Aeby* is without force." 227 F.2d at 94-95. Both the respondent and the Ohio Court of Appeals attempted to differentiate between non-negligence and assumption of the risk. However, the *Aeby* case used such terms interchangeably and such a distinction is unnecessary and without merit.

The Supreme Court in *Tiller* described the *Aeby* decision as a case utilizing assumption of risk in one of its many forms:

> It is sometimes said that courts have held the master blameless in actions by employees who have entered and remained in hazardous occupations on the premise that the employee assumed the risk; but the theory has not always appeared under the name "assumption of risk" since the same result is reached by assigning a

> given case to one of three practically interchangeable categories: (a) the employee assumed the risk: (b) he was guilty of contributory negligence; (c) the master was not negligent. See 35 Am.Jur. 719 and 3 Labatt, Master and Servant, 2d Ed. par. 1164-1172, 1205, 1210 . . . 318 U.S. at 58 (fn. 2).

In fact, the *Tiller* court cites the same page of the *Aeby* decision, page 430 (from which the excerpt relied on by the Appellate Court was taken) as an example of a decision based on assumption of risk. Then, as the Tiller quote continues, the 1939 amendment "obliterated" the assumption of risk defense, as well as its twin, the so called defense of "non-negligence." *Id.* at 58. Likewise, this Court should realize that any defense based on *Aeby* was also abolished by the 1939 Amendment.

Other federal courts have also recognized that *Aeby* was based on assumption of risk. In *Handy v. Reading Co.*, 66 F. Supp. 246 (E.D. Pennsylvania 1946) the defendant relied on, among others, the *Aeby* decision to support its position. The district court, rejecting the railroad's reasoning, noted at page 249:

> Furthermore, it will be seen that the cases relied upon by the defendant were decided before the Amendment of 1939, withdrawing assumption of risk as a defense in Federal Employers' Liability cases. The decision of the Supreme Court in the *Tiller* case, *supra*, indicates that the decision in the *Aeby* case was responsible in part for the Amendment of 1939.

No decision since the 1939 Amendment cites *Aeby* as authority for the propositions that the carrier owes no duty with regard to accumulations of ice and snow. Even the Sixth Circuit case of *Detroit, T. & I. R. Co. v. Banning*,

173 F. 2d 752 (6th Cir. 1949) which does cite *Aeby*, concludes that the carrier has the duty to take *reasonable* steps to counteract or avoid the danger presented by natural climatic conditions. 173 F.2d at 755.

Finally, if *Aeby* were still good law, no case would stand finding a duty toward natural accumulations of rain, snow and ice, rather the opposite is true. The law recognizes that the railroad companies have no control over the vagaries of the weather or climatic conditions, *Raudenbush v. Baltimore & Ohio Railroad Co.*, 160 F.2d 363 (CA3 1947) but the [F.E.L.A.] does not exempt railroad carriers from liability because of the weather. See: *Grothusen v. Natural Railroad Passenger Corporation*, 603 F. Supp. 486 (E.D. Penn. 1984) employee slipped on natural accumulation of snow on steps of engine; *Kimbler v. Pittsburgh & L.E.R.*, 331 F. 2d 383 (3rd Cir. 1964), employee fell on icy stairs leading to work; *De Chico v. Metro North Commuter Railroad*, 738 F. 2d 856 (2d Cir. 1985) central question is whether the railroad has taken reasonable precautions to ensure that natural accumulations of ice, snow and water do not create hazards; *Carter v. Union Railroad Co.*, 438 F. 2d 208 (3rd. Cir. 1970) employee fell in mud from rain on path to work; and *Duffield v. Marra, Inc. et al.*, 166 Ill. App. 3d 754, 520 N.E. 2d 938 (5th Dist. App. 1988) employee fell on ice and snow in motel parking lot while on layover.

CONCLUSION

The First Appellate District Court of Ohio ruled in its June 6, 1990 decision that the plaintiff-appellant, Charles Bobst, had established that he was employed by the railroad, engaged in interstate commerce and was injured in the course and scope of his employment. The sole basis for upholding the summary judgment was the finding that no duty was breached. The sole authority cited by the Appellate Court was the *Aeby* decision. Their conclusion that *Aeby* was not based on the assumption of risk defense is, as shown, incorrect. Clearly, *Aeby* has no precedential value as a result of the 1939 Amendments and subsequent cases, which have clearly established that a duty is owed by the railroad to take reasonable precautions against natural accumulations. Since the record is uncontroverted in this case that the Norfolk Southern Railroad took no precautions at all, the judgment entered by the trial court as affirmed by the Appellate Court should be reversed and remanded with instructions that summary judgment on the issue of negligence was improper. Accordingly, Petitioner respectfully requests that this Court grant his motion to certify.

Respectfully submitted,

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APPENDIX AND ITS INDEX

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COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

CHARLES BOBST	:	CASE No.
Plaintiff	:	A-8603585
-vs-	:	*ENTRY OF DECISION*
NORFOLK SOUTHERN CORPORATION, et al.	:	
Defendants	:	

KRAFT, J.:

The Summary Judgment motion of defendants filed Nov. 8, 1987 is granted.

There is no genuine issue as to any material fact involved.

The plaintiff injured himself on a natural accumulation of ice and snow readily, and easily apparent.

There is no legal duty to remove such material accumulations and therefor is no liability. *Lopatkovich v. City of Tiffin* (1986) 28 Ohio St.3d 204, *Sidle v. Humphrey* (1986), 13 Ohio St.2d 45 [42 O.O.2d 96].

The fact that this is an F.E.L.A. case does not alter the conclusion reached.

The defendant railroad is not an insurer of the plaintiff's health, welfare and safety. *Inman vs. Baltimore & Ohio R.R. Co.* (1959), 361 U.S. 138. Nor is the F.E.L.A. act a workers' compensation statue which provides compensation without reference to fault. *Pyzynski vs. Pennsylvania Central Trans. Co.* (W.D.N.Y. 1977) 438 F. Supp. 1044. See

also *Spinello v. New York Chicago & St. Louis Rd. Co.* (1962), 173 Ohio St. 324, syllabus [19 O.O.2d 231].

Please present an entry on or before the 30th day of September, 1988, at 9:00 A.M.

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COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

CHARLES BOBST Plaintiff vs. NORFOLK SOUTHERN CORPORATION and HIGH RIDGE HOTEL COMPANY, d/b/a HOWARD JOHNSON'S MOTOR LODGE-EAST Defendants	C890114 Case No. A8603585 Judge Robert S. Kraft NOTICE OF APPEAL (FILED FEB 21 1989)

Notice is hereby given that Charles Bobst, plaintiff, hereby appeals to the Court of Appeals of Hamilton County, Ohio, First Appellate District from the Order granting defendant's Motion for Summary Judgement and overruling plaintiff's Motion for Reconsideration entered in this action on January 23, 1989.

BY: /s/ Michael J. Hammons
MICHAEL J. HAMMONS
ATTORNEY FOR PLAINTIFF
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606/291-3100

BY: /s/ Eric D. Jackstadt
ERIC D. JACKSTADT
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CERTIFICATION

I hereby certify that a true and correct copy of the foregoing Notice of Appeal was forwarded by regular U.S. mail service to Hon. Stephen M. Yeager, Bloom & Greene Co., 2000 Central Trust Center, 201 East Fifth Street, Cincinnati, Ohio 45202, on this the 21 day of February, 1989.

/s/ Michael J. Hammons
MICHAEL J. HAMMONS

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

CHARLES BOBST, Plaintiff-Appellant, vs. NORFOLK SOUTHERN CORPORATION and HIGH RIDGE MOTEL COMPANY, d/b/a HOWARD JOHNSON'S MOTOR LODGE-EAST, Defendants-Appellees.	:	APPEAL NO. C-890114 *DECISION.* (Filed JUN 6 1990)

Civil Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From is: Affirmed

Date of Judgment Entry on Appeal: June 6, 1990

Michael J. Hammons, Esq., 308 Greenup Street, Covington, Kentucky 41011, and Eric D. Jackstadt, Esq., Route 111 at Airline Drive, P. O. Box 179, East Alton, Illinois 62024, for Plaintiff-Appellant,

Bloom & Greene Co., L.P.A., and Stephen M. Yeager, Esq., 2000 Central Trust Center, 201 East Fifth Street, Cincinnati, Ohio 45202, for Defendants-Appellees.

PER CURIAM.

This cause came on to be heard upon the appeal, the transcript of the docket, journal entries and original

papers from the Hamilton County Court of Common Pleas, the briefs and the arguments of counsel.

Plaintiff-appellant Charles Bobst appeals from the trial court's entry of summary judgment in favor of defendant-appellee Norfolk Southern Corporation, on plaintiff's claim brought pursuant to the Federal Employers' Liability Act (FELA), Section 51 *et seq.*, Title 45, U.S. Code. We affirm the trial court's judgment.

The record reveals that on January 13, 1985, plaintiff was working as a conductor for Norfolk Southern on a train bound for Cincinnati. The train arrived at approximately 8:00 a.m. Plaintiff was then transported by a company-hired vehicle to Howard Johnson's Motor Lodge-East, to begin an eight-hour rest period that is mandated by Section 62, Title 45, U.S. Code. According to plaintiff, Norfolk Southern had contracted with defendant High Ridge Motel Company, the owner of the Howard Johnson's motel, to provide lodging for Norfolk Southern crews during their rest periods. After checking into the motel, plaintiff decided to walk to a nearby McDonald's restaurant for breakfast. En route to the restaurant, plaintiff slipped and fell on snow and ice covering a sidewalk and was injured.

On May 6, 1986, plaintiff filed this lawsuit against Norfolk Southern based upon FELA and against High Ridge based upon common-law negligence. Defendants filed a single motion for summary judgment, which the trial court granted on January 27, 1989. Plaintiff's appeal goes only to Norfolk Southern, his single assignment of error asserting that summary judgment was erroneously granted in favor of Norfolk Southern.

FELA imposes upon a railroad the duty to use ordinary care to provide a safe place to work for its employee, even when the employees are required to go into the premises of a third party over which the railroad has no control. *Shenker v. Baltimore and Ohio RR. Co.* (1963), 374 U.S. 1, 7, 83 S. Ct. 1667, 1672. Specifically, to recover under FELA a plaintiff must prove: (1) that defendant is a common carrier by railroad engaged in interstate commerce; (2) that the injured person was employed by defendant with duties further such commerce; (3) that the injuries were sustained while the Claimant was so employed; and (4) that the injuries were the result of negligence of the defendant company. *Fowler v. Seaboard Coastline RR. Co.* (C.A.5, 1981), 638 F. 2d 17; Section 51, Title 45, U.S. Code.

Norfolk Southern does not take issue with the first two elements of proof, and concedes on appeal that plaintiff was acting within the course and scope of his employment when he was injured; it argues only that it did not breach any duty of care owed to plaintiff. We agree.

Considering the negligence aspect of an FELA claim, the United States Supreme Court held in *Missouri Pacific RR. Co. v. Aeby* (1928), 275 U.S. 426, 530, 48 S. Ct. 177, 179, as follows:

> No employment is free from danger. Fault or negligence on the part of petitioner may not be inferred from the mere fact that respondent fell and was hurt. She knew that it had rained and that the place was covered with ice and snow. * * * It is a matter of common knowledge that almost everywhere there are to be found in public ways and on private grounds numerous

> places in general use by pedestrians that in similar weather are not materially unlike the place where respondent fell. Under the circumstances, it cannot reasonably be held that failure of petitioner to remove the snow and ice violated any duty owed to her. • • •

Similarly, in this case plaintiff stated in his deposition that the temperature at the time of his fall was about twenty degrees, that he was fully aware of the presence of a natural accumulation of ice and snow on the sidewalk, and that he knew the area was ice and slippery. Based upon the undisputed facts in the record and consistent with the reasoning of *Aeby, supra*, we hold reasonable minds can only conclude that Norfolk Southern did not violate any duty owed to plaintiff.[1] Accordingly, the single assignment of error is overruled and the judgment of the trial court is affirmed.

UTZ, P.J., KLUSMEIER and HILDEBRANDT, JJ.

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[1] We disagree with plaintiff's argument that *Aeby, supra*, is distinguishable because it relied on the doctrine of assumption of risk, which was abolished by the 1939 amendment to FELA. *Aeby* held only that since the employer violated no duty owed to the employee, it was not negligent. 275 U.S. at 430, 48 S.Ct. at 179.

PLEASE NOTE:

The Court has placed of record its own entry in this case on the date of the release of this Decision.

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

CHARLES BOBST Plaintiff-Appellant vs. NORFOLK SOUTHERN CORPORATION and HIGH RIDGE MOTEL COMPANY, d/b/a HOWARD JOHNSON'S MOTOR LODGE EAST, Defendants-Appellees	:	An appeal from a decision of the First Appellate District of Ohio, Hamilton County, Ohio on Appeal No. C-890114 dated June 6, 1990. Civil Appeal from Hamilton County Court of Common Pleas, Trial No. A-8603585 (Filed JUL 03 1990)

NOTICE OF APPEAL

Now comes the Appellant, CHARLES BOBST, by his attorneys, ERIC D. JACKSTADT and MICHAEL J. HAMMONS, and hereby gives notice of his intention to appeal the decision of the First Appellate District in the above-stated case, dated June 6, 1990 to the Supreme Court of Ohio.

CHARLES BOBST

BY: _____

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ATTORNEYS FOR PLAINTIFF

THE SUPREME COURT OF OHIO

1990 TERM

To wit:
November 28, 1990

Charles Bobst,
Appellant,
v.
Norfolk Southern Corp. et al.,
Appellees.

Case No. 90-1435

ENTRY

Upon consideration of the motion for an order directing the Court of Appeals for Hamilton County to certify its record, it is ordered by the Court that said motion is overruled.

COSTS:

Motion Fee, $40.00, paid by Pratt & Callis.

(Court of Appeals No. C890114)

/s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

FEDERAL EMPLOYERS' LIABILITY ACT
45 U.S.C. § 51-60

§ 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; employee defined

Every common carrier by railroad while engaging in commerce between any of the several State or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

§ 52. Carriers in Territories or other possessions of United States

Every common carrier by railroad in the Territories, the District of Columbia, the Panama Canal Zone, or other possessions of the United States shall be liable in damages to any person suffering injury while he is employed by such carrier in any of said jurisdictions, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

(Apr. 22, 1908, c. 149, § 2, 35 Stat. 65.)

§ 53. Contributory negligence; diminution of damages

In all actions on and after April 22, 1908 brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided*, That no such employee who may be injured or killed shall be

held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

(Apr. 22, 1908, c. 149, § 3, 35 Stat. 66.)

§ 54. Assumption of risks of employment

In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employees shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

(Apr. 22, 1908, c. 149, § 4, 35 Stat. 66; Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404.)

§ 55. Contract, rule, regulation, or device exempting from liability; set-off

Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: *Provided*, That in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it

has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitle thereto on account of the injury or death for which said action was brought.

(Apr. 22, 1908, c. 149, § 5, 35 Stat. 66.)

§ 56. Actions; limitations; concurrent jurisdiction of courts

No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.

Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States.

(Apr. 22, 1908, c. 149, § 6, 35 Stat. 66; Apr. 5, 1910, c. 143, § 1, 36 Stat. 291; Mar. 3, 1911, c. 231, § 291, 36 Stat. 1167; Aug. 11, 1939, c. 685, § 2, 53 Stat. 1404; June 25, 1948, c. 646, § 18, 62 Stat. 989.)

§ 57. Who included in term "common carrier"

The term "common carrier" as used in this chapter shall include the receiver or receivers or other persons or corporations charged with the duty of the management and operation of the business of a common carrier.

(Apr. 22, 1908, c. 149, § 7, 35 Stat. 66.)

§ 58. Duty or liability of common carriers and rights of employees under other acts not impaired

Nothing in this chapter shall be held to limit the duty or liability of common carrier or to impair the rights of their employees under any other Act or Acts of Congress.

(Apr. 22, 1908, c. 149, § 8, 35 Stat. 66.)

§ 59. Survival of right of action of person injured

Any rights of action given by this chapter to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee, and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, but in such cases there shall be only one recovery for the same injury.

(Apr. 22, 1908, c. 149, § 9, as added Apr. 5, 1910, c. 143, § 2, 36 Stat. 291.)

§ 60. Penalty for suppression of voluntary information incident to accidents; separability of provisions

Any contract, rule, regulation, or device whatsoever, the purpose, intent, or effect of which shall be to prevent employees of any common carrier from furnishing voluntarily information to a person in interest as to the facts incident to the injury or death of any employee, shall be void, and whoever, by threat, intimidation, order, rule, contract, regulation, or device whatsoever, shall attempt to prevent any person from furnishing voluntarily such information to a person in interest, or whoever discharges or otherwise disciplines or attempts to discipline any employee for furnishing voluntarily such information

to a person in interest shall, upon conviction thereof, be punished by a fine of not more than $1,000 or imprisoned for not more than one year, or by both such fine and imprisonment, for each offense: *Provided*, That nothing herein contained shall be construed to void any contract, rule, or regulation with respect to any information contained in the files of the carrier, or other privileged or confidential reports.

If any provision of this chapter is declared unconstitutional or the applicability thereof to any person or circumstances is held invalid, the validity of the remainder of the chapter and the applicability of such provision to other persons and circumstances shall not be affected thereby.

(Apr. 22, 1908, c. 149, § 10, as added Aug. 11, 1939, c. 685, § 3, 53 Stat. 1404.)

Supreme Court, U.S.
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No. 90-1384

In The

Supreme Court of the United States

October Term, 1991

CHARLES BOBST,

Petitioner,

vs.

NORFOLK SOUTHERN CORPORATION and HIGH RIDGE MOTEL COMPANY d/b/a HOWARD JOHNSON'S MOTOR LODGE EAST,

Respondent.

Petition For Writ Of Certiorari To The Court Of Appeals Of Ohio

BRIEF OF RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Ohio Appellate Court properly affirmed the trial court's granting of summary judgment for Defendant, Norfolk Southern, on the basis that Defendant breached no duty of care owed to Plaintiff, Charles Bobst, under the Federal Employers' Liability Act, 45 U.S.C., § 51-60.

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Respondent.

Petition For Writ Of Certiorari To The Court Of Appeals Of Ohio

BRIEF OF RESPONDENT IN OPPOSITION

OPINION BELOW

The Supreme Court of Ohio denied review of the decision of the Ohio First District Court of Appeals *Bobst v. Norfolk Southern Corporation*, 564 N.E.2d 500 (1990). The decision of the Ohio Court of Appeals (Petitioner App. A-5) and the decision of the Ohio Court of Common Pleas were not reported (Petitioner App. A-1).

JURISDICTIONAL STATEMENT

Petitioner claims jurisdiction of this Court pursuant to 28 U.S.C. § 1257(a) as a result of the petitioner's motion to certify being overruled by the Supreme Court of Ohio on November 28, 1990 (Petitioner App. A-11).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Petitioner asserts a claim for relief under the Federal Employers' Liability Act, 45 U.S.C. § 51-60.

STATEMENT OF THE CASE

At the outset, it must be noted that High Ridge Motel Company, dba Howard Johnson Motor Lodge, East, ("High Ridge") is no longer a party to this action. Petitioner did not appeal the trial court's decision as to High Ridge.

Additionally, it must also be noted that the record in this case consists solely of the pleadings filed by the various parties. The only pleading containing any facts is the deposition of Mr. Charles Bobst, the petitioner, which was filed by respondent in support of its motion for summary judgment submitted at the trial court level. Consequently, the facts initially presented for review in this case were not complex. However, there exists some variance between the parties' interpretation and/or rendition of the facts. As noted in petitioner's brief, Mr. Bobst was engaged in a layover at High Ridge's motel

when he slipped and fell on ice allegedly injuring himself. When Mr. Bobst arrived at the motel on the morning in question, he saw that the motel premises was icy, slippery and snowy. He could see ice and snow on the ground. In fact, there was ice and snow everywhere.

As he exited the motel on his way to the adjacent McDonald's, nothing obstructed his view. Contrary to the petitioner's assertion, Mr. Bobst did not exit the "main" entrance to the motel. Rather, as the photographs appended to his deposition clearly reveal, he has exiting a side entrance to the motel premises. As he exited the motel door, he could see the ice and snow. There was nothing hiding or obstructing his view of the ice. No shoveling or snow removal had been attempted. What existed was simply the natural accumulation of ice and snow. It was daylight and there were no other unusual circumstances existing at the time of his fall.

Petitioner maintains that prior to this incident, complaints had been made to the motel management regarding snow, ice and slippery conditions at the motel. However, Mr. Bobst's deposition testimony clearly reveals that he had no personal knowledge of anyone complaining to the motel about snow, ice and slippery conditions. Finally, petitioner alleges that the Ohio Court of Appeals held that Mr. Bobst was acting within the course and scope of his employment when he was injured. However, the Ohio Court of Appeals did not actually make such a finding. Rather, for purposes of argument only both at the trial court level and the appellate level, respondent conceded that issue.

ARGUMENT

This Court has never held that the F.E.L.A. imposed upon a railroad, as an employer, strict liability as a result of injuries sustained by railroad employees. Indeed, this Court has recognized that the F.E.L.A. does not make the railroad the insurer of its employees' health, welfare and safety. *Inman v. Baltimore and Ohio R.R. Co.*, 361 U.S. 138 (1959). The F.E.L.A. is not a workers compensation statute and does not impose liability without fault. *Pyzynski v. Penn Central Transportation Co.*, 438 F. Supp. 1044 (1977 W.D., N.Y.). The Act itself states that for an employee to recover against the railroad, the employee must establish "negligence" on behalf of the railroad, 45 U.S.C. § 51.

It is clear and undisputed that the 1939 amendment to the F.E.L.A. did eliminate "assumption of the risk" as a defense available to the employer. However, the amendment did not transform the F.E.L.A. into a workers compensation statute. This distinction is clearly defined by Justice Frankfurter in his concurring opinion in *Tiller v. Atlantic Coast Line R.R. Co.*, 318 U.S. 54 (1943). At 71 Justice Frankfurter wrote:

> [T]he 1939 amendment left intact the foundation of the carrier's liability – negligence. Unlike the English enactment which, nearly fifty years ago, recognized that the common law concept of liability for negligence is archaic and unjust as a means of compensation for injuries sustained by employees under modern industrial conditions, the federal legislation has retained negligence as the basis of a carrier's liability. For reasons that are its concern and not ours, Congress chose not to follow the example of most states in establishing systems of workmen's compensation not based upon negligence. Congress has to some

> extent alleviated the doctrines of the law of negligence as applied to railroad employees. By specific provisions in the Federal Employers' Liability Act, it has swept away 'assumption of risk' as a defense once negligence is established. But it has left undisturbed the other meaning of 'assumption of risk,' namely, that an employee injured as a consequence of being exposed to a risk which the employer in the exercise of due care could not avoid is not entitled to recover, since the employer was not negligent.

At 72, Justice Frankfurter continues:

> The basis of an action under the Act remains the carrier's negligence. The carrier is not to be relieved from the consequences of its negligence by any claim that the employee 'assumed the risk' of its negligence. But neither is the carrier to be charged with those injuries which result from the 'usual risks' incident to employment on railroads – risks which cannot be eliminated through the carrier's exercise of reasonable care.

Finally, also at 72, Justice Frankfurter writes:

> But until Congress chooses to abandon the concept of negligence, upon which the Act now rests, in favor of a system of workmen's compensation not dependent upon negligence, the courts cannot discard the principle expressed, in one of its senses by the phrase 'assumption of risk,' namely, that a carrier is not liable unless it was negligent.

This Court in *Missouri Pacific R.R. Co. v. Aeby*, 275 U.S. 426 (1928), did discuss the concept of assumption of risk as a defense to an employee's claim against his employer. However, it is clear that the decision was also based on an absence of negligence on the part of the railroad as a matter of law. The Court at 431 wrote: "as

negligence on the part of the petitioner is essential, we need not consider its contentions in respect of assumption of risk and negligence on the part of respondent."

It is axiomatic that in order to establish negligence, a party seeking recovery must prove that the party from whom recovery is sought breached a duty owed to the party seeking recovery and that said breach proximately caused that party damage.

Paragraph 3 of the syllabus in *Tiller* defines the duty owed by the railroad. It reads as follows:

> The question of the negligence of the employer is to be determined by the general rule which defines negligence as the lack of due care under the circumstances; or the failure to do what a reasonable and prudent man would ordinarily have done under the circumstances; or doing what such a person under the circumstances would not have done. The standard of care must be commensurate to the dangers of the employment.

It is absurd under the facts of this case to hold that the railroad had a duty to clear a clean path from the motel premises door and across the motel's parking lot in order that the plaintiff could safely negotiate the natural accumulation of ice and snow to reach the McDonald's Restaurant. Arguably, if such a duty is found to be owed, the railroad would be required to clean a path all the way from the motel door to the entrance of the McDonald's Restaurant. This is an absurd burden or duty to impose upon the railroad. Absent a duty, no negligence can be found as duty is an indispensable element of negligence.

Petitioner cites several cases in support of his position that the railroad indeed has such a duty. In particular, petitioner cites *Kimbler v. Pittsburgh & L.E.R.*, 331 F.2d 383 (3rd Cir. 1964). Clearly, the facts in *Kimbler* are distinguishable from the facts found in this particular incident. *Kimbler* was injured on the premises of the railroad when he slipped on ice and snow. The court in *Kimbler*, however, recognized that the railroad is not an insurer of the safety of its employees. See, Paragraph 1 of the syllabus. Further, the court in *Kimbler* recognized that the railroad had no control over the vagaries of the weather or climatic conditions. At 387 of the *Kimbler* decision, the court recognizes the railroad's argument:

> Finally, the railroad argues that to impose liability under the facts here present would require it to call in innumerable men on a moments notice for the purpose of doing the impossible task of treating with chemicals 'all exposed steps, walkways, yard services, switches, engines, railroad cars and other walking services . . . irrespective of the location and number of such services.'

The court in *Kimbler* found that the railroad's argument was compelling when applied to the total yard and work area. Certainly, it would be an unduly burdensome and onerous duty to impose upon the railroad the duty to remove the natural accumulation of ice and snow at motels where arrangements for layovers have been made for its employees by the railroad. To impose such a duty would go beyond requiring the due care as defined in Paragraph 1 of the syllabus of *Tiller* and rather make the railroad strictly liable for any injuries that occurred to an employee at any time under any conditions.

Petitioner also places reliance on the decision of *Anderson v. Elgin, Joliet & Eastern Railway Company*, 227 F.2d 91 (8th Cir. 1955). Paragraph 1 of the syllabus of the *Anderson* decision reads as follows:

> Generally, a railroad is not liable under the F.E.L.A. to its employees for injuries resulting from climatic conditions, such as ice and snow; but *within its yard limits* it must exercise a degree of care commensurate with the risk to prevent the accumulation of ice and snow in such quantity, form, and location as to be a menace to the safety of its employees working in its yards. (Emphasis added).

The court in *Anderson* states the general rule and lists the exceptions, notably those that involve ice and snow within the railroad's yards. The exception to the general rule cited in *Anderson* is not found in this case. At the time of his fall, Mr. Bobst was not presented with any unusual circumstances. He was simply walking to the McDonald's Restaurant adjacent to the motel in broad daylight and with an unobstructed view when he slipped and fell on naturally accumulated ice and snow.

The petitioner himself recognizes that railroad companies have no control over the vagaries of the weather or climatic conditions when he cites *Raudenbush v. Baltimore & Ohio Railroad Co.*, 160 F.2d 363 (CA3 1947). The petitioner then cites a number of cases which he claims holds the railroad liable for the employee's injury sustained on natural accumulations of ice and snow. However, the cases relied upon by the petitioner are all distinguishable for a number of reasons. For example, petitioner's reliance on *Grothusen v. Natural Railroad Passenger Corporation*, 603 F. Supp 486 (E.D. Penn. 1984) is

misplaced. Grothusen apparently slipped on ice and snow while disembarking from an engine. The case was tried to a jury and a defense verdict was rendered. The employee appealed stating that the court should have granted him an instruction that "the defendant was negligent in this case and . . . such negligence contributed in whole or in part to the plaintiff's injury." *Grothusen, supra* at 489. The court found that no error in failing to grant that instruction existed as the jury determined that the railroad was not negligent.

The petitioner also relies on *DeChicc v. Metro-North Commuter Railroad*, 738 F.2d 856 (2nd Cir. 1985). Petitioner cites *DeChico* for the principle that the central question in dealing with cases involving the natural accumulation of ice and snow is whether the railroad had taken reasonable precautions to be sure that natural accumulations of ice, snow and water did not create hazards. Actually, a reading of *DeChico* shows that it stands for a much narrower principle. Specifically, the court in *DeChico* held that the question to be resolved was whether the railroad had taken reasonable steps to ensure that natural accumulations of ice, snow and water had not created hazardous conditions *inside* the shop where DeChico was working. The facts in *DeChico* are distinctly different from those found in this case.

In *Carter v. Union Railroad Co., et al.*, 438 F.2d 208 (3rd Cir. 1970), an employee of the railroad fell in mud from rain on a path to work over a third party's property. The path was used on a regular basis by employees of the railroad to get to work. The facts in *Carter* are also distinctly different than the facts found in this case.

CONCLUSION

This case should not be reviewed by this Court as the appropriate result was reached by the courts below. This case turns on its own facts which are very narrow in scope. This case does not present a compelling or important question of grave public concern for this Court to review.

The F.E.L.A. is a statute requiring negligence on the part of the railroad before recovery can be had by an employee. The mere fact that an employee was injured does not establish a prima facie claim against the railroad. The employee must provide some evidence of negligence before a case can be submitted to a jury.

To hold, under the facts of this case, that the railroad had a duty to remove the natural accumulation of ice and snow existing in the parking lot at a motel where employees laid over would indeed judicially transform the F.E.L.A. into a workers' compensation statute. That task should be left to Congress.

The petitioner did not present any evidence that the railroad was aware (or should have been aware) of the icy conditions on the motel premises. There was no evidence presented detailing what the railroad should have done to prevent the fall. The facts are simply that Mr. Bobst fell on naturally accumulated ice and snow while leaving the motel to eat at the adjacent McDonald's Restaurant. There were no obstructions and it was daylight.

The facts in this case present one of those rare circumstances under the F.E.L.A. where fair minded jurors cannot honestly differ as to whether the fault of the

railroad played any part in Mr. Bobst's injury. Petitioner's writ of certiorari should be denied.

Respectfully submitted,

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